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Terence J. Center

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THE UNITED STATES'S ORGANIC FOODS PRODUCTION ACT: DOES THE SMALL- FARMER EXCEPTION BREACH THE UNITED STATES'S OBLIGATIONS UNDER GATT?

Terence J. Centner*

I. INTRODUCTION

Safety concerns about pesticides and synthetics has led a small but notable group of consumers to seek organic food products.¹ An organic food is "a food which is labeled as organic or organically grown and which has been produced, transported, distributed, processed, and packaged without the use of synthetic pesticides, synthetically compounded fertilizers, synthetic growth hormones, or artificial radiation and which has been verified by a certifying agent"² Both the U.S.³ and the European Community (EC)⁴ Council Regulation 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [hereinafter Council Reg. 2092/91] have recently adopted new legislation on organic products, and other governmental and private certification programs have been established to monitor organic food labels.⁵

* Professor, College of Agricultural and Environmental Sciences, The University of Georgia, Athens. B.S., Cornell University; J.D., S.U.N.Y. at Buffalo; LL.M., University of Arkansas.

1. The movement for organic trade arguably commenced in 1893 with the foundation of the Vegetarische Obstbaukolonie Eden GmbH in Oranienburg, Germany. Carl J.M.C. Haest, *From Farmer to Shelf: Trade of Organically Grown Products*, ECOLOGY & FARMING, 4th Qtr. 1990, at 9; see also NICOLAS LAMPKIN, ORGANIC FARMING 450-56 (1990).

2. FLA. STAT. ANN. (West) § 504.23 (Supp. 1993). For a more detailed description of organic farming, see LAMPKIN, *supra* note 1, at 557-72.

3. Organic Foods Production Act of 1990, Pub. L. No. 101-624; 104 Stat. 3359, 3935-3951 (1990), 7 U.S.C. §§ 6501-6522 (Supp. 1991).

4. Council Regulation 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs, 1991 O.J. (L 198) 1 [hereinafter Council Reg. 2092/91].

5. LAMPKIN, *supra* note 1, at 444-50; Gordon G. Bones, *State and Federal Organic Food Certification Laws: Coming of Age?* 68 N.D.L. REV. 405 (1992).

As developed countries establish mechanisms to implement organic food regulations, issues may arise as to whether the regulations could constitute a barrier to trade, in contravention of the General Agreement on Tariffs and Trade (GATT)⁶ or technical regulations creating unnecessary trade obstacles.⁷ GATT seeks to eliminate barriers to trade, although its rules include exceptions such as Article XX allowing measures "necessary to protect human, animal or plant life or health"⁸ that may allow countries to enact restrictions that have the ancillary effect of interfering with the free movement of goods.⁹ Food safety regulations may impose barriers or constitute unnecessary trade obstacles, as recently alleged for EC provisions precluding meat products containing growth hormones¹⁰ and the EC's temporary ban on products derived from animals treated with bovine somatotropin.¹¹

Neither the U.S.¹² nor the EC legislation¹³ on organically produced products precludes the importation of foreign organic products. Under the U.S. Organic Foods Production Act, the Secretary of Agriculture

6. Oct. 30, 1947, 61 Stat. pt. 5, at A-11 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

7. See Beth Sanders, *International Trade—Possible Undermining of U.S. Pesticide and Food Safety Laws by the Draft Text of the Uruguay Round of GATT Negotiations*, 22 GA. J. INT'L & COMP. L. 233 (1992); CAROL S. KRAMER, *HARMONIZING HEALTH AND SANITARY STANDARDS IN THE GATT: PROPOSALS AND ISSUES, RESOURCES FOR THE FUTURE* (1988).

8. GATT, *supra* note 6, art. XX(b).

9. A recent related issue involves the use of environmental protection measures as barriers to trade. See Eliza Patterson, *GATT and the Environment—Rules Changes to Minimize Adverse Trade and Environmental Effects*, J. WORLD TRADE, June 1992, at 99.

10. See Sanders, *supra* note 7, at 240; C. Foster Knight, *Effects of National Environmental Regulation on International Trade and Investment—Selected Issues*, 10 U.C.L.A. PAC. BASIN L.J. 212 (1991); Barry Krissoff, *The European Ban on Livestock Hormones and Implications for International Trade*, 12 NAT'L FOOD REV. July-Sept. 1989, at 34-36. The EC also has convinced the Codex Alimentarius Commission to forgo adopting maximum residue levels for four growth-promoting hormones. Carol S. Kramer, *Implications of the Hormone Controversy for International Food Safety Standards*, 105 RESOURCES (1991). The Codex Alimentarius Commission may have disregarded its own scientific advisory committee in its decision. CODEX: *CODEX Alimentarius Commission Report of the Nineteenth Session*, Food and Agriculture Organization of the United Nations and the World Health Organization, July 1991, at 27-29.

11. Steven J. Rothberg, Note, *From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade*, 75 MINN. L. REV. 505, 517 (1990); AGRA EU-ROPE, *Commission Procrastinates Again over BST*, Jan. 10, 1992, at 5.

12. 7 U.S.C. § 6505(b) (Supp. 1991).

13. Council Reg. 2092/91, *supra* note 4, at 3-4. Article 5 of the EC Council Regulation contains two alternatives that provide for the sale of imported organic products. *Id.* Paragraph 1(b) requires that the product be produced according to the EC requirements or to be imported from a third country under the arrangements of Article 11. *Id.* Article 11 requires the Commission to develop a list of third countries that substantially meet the production and inspection requirements of the EC. *Id.* at 7. The development of a list has proven difficult. See EC Council Regulations 94/92, 1992 O.J. (L 11) 14-15; 1535/92, 1992 O.J. (L 162) 15; 2083/92, 1992 O.J. (L 208) 15-16. Paragraph 1(c) of Article 5 allows the product to be produced or imported by an operator meeting the requirements of Articles 8 and 9. Council Reg. 2092/91, *supra* note 4, at 3.

determines whether imported organic "products have been produced and handled under an organic certification program that provides safeguards and guidelines governing the production and handling of such products that are at least equivalent to the requirements of [U.S. law]." ¹⁴ Assuming that this provision is applied fairly, the U.S. Act provides a mechanism whereby foreign products may be imported into the United States.

Possibilities remain, however, that a provision of the U.S. or EC organic production legislation may be found to establish a trade barrier or an obstacle to trade based upon an ethical or an environmental value not permitted under GATT. ¹⁵ Another issue involves the question of whether any provision of the organic production legislation operates to treat foreign products less favorably than domestic products or to afford protection to domestic production. ¹⁶ Provisions that provide benefits for domestic products or producers may violate a country's national treatment obligations under Article III of GATT. ¹⁷

This article examines a specific exception incorporated into the U.S. Act for small farmers ¹⁸ to determine whether it may violate the national treatment obligations of GATT. This exception, called the small-farmer exception, means that products produced by small U.S. farmers are not subject to all of the requirements of the U.S. Act, while products produced by foreign small farmers enjoy no similar exception. ¹⁹ The lack of comity for foreign products produced by small farmers raises two related issues under GATT Article III. First, does the exception mean that products of foreign small farmers are accorded less favorable treatment than similar products of domestic farmers? ²⁰ Second, does this exception constitute a regulation protecting domestic production? ²¹ This article analyzes the small-farmer exception and Article III of GATT and suggests that the small-farmer exception implicitly breaches the United States' obligations under GATT.

14. 7 U.S.C. § 6505 (Supp. 1991).

15. For example, the EC could claim that the U.S. law allows too many pesticides to be used on animals that may be labeled as organically grown. For this reason, the EC could declare that the U.S.'s organically grown meat does not meet its standards for organic products and preclude the sale of such products labeled as being organically produced.

16. GATT, *supra* note 6, art. III.

17. See John H. Jackson, *National Treatment Obligations and Non-Tariff Barriers*, 10 MICH. J. INT'L L. 207 (1989).

18. 7 U.S.C. § 6505(d) (Supp. 1991).

19. The small-farmer exception only applies to U.S. farmers because § 6505(a) concerns domestic products. *Id.* § 6505(a). Imported products are governed by § 6505(b). *Id.* § 6505(b).

20. This might violate paragraph 4 of Article III. GATT, *supra* note 6, art. III(4).

21. This might violate paragraph 1 of Article III. GATT, *supra* note 6, art. III(1).

II. THE SMALL-FARMER EXCEPTION

The compliance requirements of section 6505 of the U.S. Organic Foods Production Act include the small-farmer exception in subsection (d).²² The exception states that subsection (a)(1) of this section "shall not apply to persons who sell no more than \$5,000 annually in value of agricultural products."²³ The compliance provisions of subsection (a)(1) concern domestic products and provide:

(A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and

(B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.²⁴

These compliance provisions do not apply to domestic small farmers in regard to selling and labeling of organic products, with selling and labeling being described in the compliance provisions as applying to organically produced products that are produced and handled in accordance with the Act.²⁵

Although the terms "selling" and "labeling" are not defined in the Act,²⁶ the language of subsection (a)(1) shows that the compliance requirements are intertwined with the production and handling requirements of the Act.²⁷ Further elaboration of the Act's requirements regarding selling and labeling is contained in the general requirements of section 6506.²⁸ Agricultural products "sold or labeled as organically produced must . . . (A) be produced only on certified organic farms and handled only through certified organic handling operations in accordance with this [Act]; and (B) be produced and handled in accordance with [a program established under the Act]."²⁹ Read with the compliance provisions, these requirements imply that the essence of selling and labeling of organic products is certification under an organic certification program developed pursuant to the Act.

22. 7 U.S.C. § 6505(d) (Supp. 1991).

23. *Id.* Thus, a farmer selling nonorganic products would be required to include the values of the sales from these products in determining whether sales exceed \$5,000.

24. *Id.* § 6505(a)(1).

25. *Id.* The Act defines "organically produced" in § 6502(14). *Id.* § 6502(14).

26. The terms "selling," "labeling," and "organic product" are not defined in § 6502. *Id.* § 6502.

27. One of the purposes of the Act is "to assure consumers that organically produced products meet a consistent standard. . . ." *Id.* § 6501.

28. *Id.* § 6506.

29. *Id.* § 6506(1).

For certification, a producer must submit an organic plan to the certifying agent,³⁰ and if applicable, the state organic certification program.³¹ An organic plan must delineate provisions that will foster soil fertility, regulate the application of manure to crops, and otherwise meet the purposes of the Act.³² Farms and handling operations are certified by certifying agents if they meet the requirements of the Act.³³ Products labeled as organically produced must have been "produced and handled in compliance with an organic plan agreed to by the producer and handler . . . and the certifying agent."³⁴

The grant of an exception to small farmers from compliance with the certification requirements removes burdensome restraint. The development of an organic plan and securing certification involves time, effort, and costs that might constitute a hardship to small producers. Yet the noncertification of organic products produced by small farmers may not seriously detract from the purposes of the Act since the producers must comply with other production and handling requirements of the Act.³⁵ The exemption of small producers from certification also does not detract from the significance of the U.S. Department of Agriculture organic produce label.³⁶ If a small farmer desires to affix a label or other market information informing purchasers that products meet USDA standards for organic production, then certification is required.³⁷

III. COMPLYING WITH GATT

Paragraph 4 of GATT Article III on national treatment obligates a nation to treat imported products no less favorably than like products of national origin.³⁸ Paragraph 1 of Article III establishes an obligation to

30. The term "certifying agent" is defined to include state officials and persons including private entities that are accredited by the Secretary of Agriculture. *Id.* § 6502(3).

31. *Id.* § 6513(a). State organic certification programs may be approved pursuant to the provisions of § 6507. *Id.* § 6507.

32. *Id.* § 6513. Special provisions delineate requirements for livestock and wild crops. *Id.* § 6513(c)-(f).

33. *Id.* § 6503(d).

34. *Id.* § 6504(3). The small-farmer exception means that small farmers may circumvent this labeling requirement. *Id.* § 6505(d).

35. Non-certified small farmers would still need to meet the production requirements set forth for plant and animal products, as well as other handling requirements. *Id.* §§ 6508-6510.

36. *Id.* § 6505(a)(2).

37. Subsection (d) of section 6505 exempts only small producers from subsection (a)(1). *Id.* § 6505(d). Since subsection (a)(2) concerns the USDA standards and seal, these small producers are not exempted from the federal label requirements. *Id.*

38. Article III is entitled "National Treatment on Internal Taxation and Regulation." GATT, *supra* note 6, art. III. The text of paragraph 4 reads:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded

refrain from adopting regulations that afford protection to domestic production.³⁹ The special treatment for domestic small farmers under the small-farmer exception may have the effect of favoring domestic products or affording protection to American domestic production; thus, the exception may be contrary to the United States's obligations under GATT.

An initial issue may be whether the small-farmer exception from certification is a regulation that is within the scope of GATT Article III. Both paragraphs 1 and 4 of Article III qualify coverage to include regulations affecting internal sales and the offering for sale of domestic and imported products.⁴⁰ A requirement that products be certified before they may be sold affects the offering for sale of products; therefore, the certification provisions should be considered to be a regulation addressed by Article III.

The issue of whether the small-farmer exception treats imported products less favorably than domestic products depends on the application of the U.S. Act to foreign organic certification programs. The small-farmer exception enables domestic small farmers to avoid the costs of preparing and submitting an organic plan for certification and from having their products certified.⁴¹ Although this does not apply to foreign small farmers, their products might receive similar treatment. Section 6505(b) of the U.S. Act allows the Secretary of Agriculture to allow foreign organic products to be sold as organically produced if the foreign certification program "provides safeguards and guidelines governing the production and handling of such products that are at least equivalent to the requirements of the [U.S. Act.]"⁴² A foreign organic production law could except small producers from certification requirements so that

to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use

....

Id. art. III(4).

39. Article III of the GATT requires contracting parties to take internal taxes and other charges into account. The relevant language provides as follows:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

GATT, *supra* note 6, art. III(1).

40. See *supra* text accompanying notes 38 & 39.

41. See *supra* text accompanying notes 30-35.

42. 7 U.S.C. § 6505(b) (Supp. 1991).

their non-certified products could enter the U.S. Therefore, the exception may not directly infringe upon the equal treatment proffered by paragraph 4 of Article III.

The small-farmer exception, however, would favor U.S. products if the foreign certification program does not grant a small-farmer exception or the U.S. Secretary of Agriculture declines to approve a foreign program that excuses products of small farmers from certification. The latter action, failure of the Secretary to approve a similar foreign program, may favor domestic products over foreign products and could be found contrary to the U.S.'s obligations under GATT Article III.

A more difficult question arises under the obligation to refrain from affording protection to domestic production, established by paragraph 1.⁴³ The issue is whether the small-farmer exception provides implicit discrimination against foreign products that acts to protect domestic production.⁴⁴ Assuming that the U.S. Secretary of Agriculture finds a foreign certification program allowing small foreign producers to avoid certification to be equivalent, does the small-farmer exception have the effect of discriminating against foreign products and thereby afford protection to domestic production?⁴⁵

The facts suggest that the small farmer exception provides *de facto* discrimination against foreign products to favor domestic production. Due to the costs, organization, and knowledge required for international trade, it might be expected that few foreign small farmers would be exporting organic products. Rather, most small farmers, especially those not inclined to meet organic certification requirements, would sell their products locally. Thus, the small-farmer exception primarily provides benefits to producers of domestic products and does not convey corresponding benefits to producers of foreign products. The availability of these benefits to domestic producers impliedly affords protection to domestic production.

Jackson notes that although a regulation on its face may appear to be nondiscriminatory, it may have the effect of affording protection contrary to the obligations of paragraph 1 of GATT Article III.⁴⁶ The

43. GATT, *supra* note 6, art. III(1).

44. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 193 (1989).

45. Equal treatment of domestic and imported products may be insufficient under paragraph 1 of Article III. Paragraph 1 precludes regulations that have an effect of affording protection in the absence of some other justification. *See* JACKSON, *supra* note 44.

46. *Id.*

small-farmer exception should be regarded as such a regulation. The exception may be expected to reduce the production costs of organic products of American small farmers while foreign production would be expected to incur certification costs. Thus, it may be concluded that the discriminatory effect of the small-farmer exception operates to afford protection to domestic production contravening the U.S.'s obligations under GATT.

IV. CONCLUSION

As governments provide rules to ascertain that organic products offered for sale meet certain production and handling standards, one challenge is to provide a set of rules that does not act as a barrier to trade, create an unnecessary trade obstacle, or violate other international obligations. EC regulations concerning growth hormones⁴⁷ and bovine somatotropin⁴⁸ and the U.S.'s Delaney clause⁴⁹ reveal problems in drafting legislation responsive to consumer concerns within the parameters required by international commitments. The inclusion of the small-farmer exception in the U.S. Organic Foods Production Act also discloses a problem with respect to the national treatment obligation of GATT. Although the exception does not establish explicit favoritism or protection for domestic production, it implicitly discriminates against foreign products so as to afford protection to domestic production. Thus, it may be concluded that the small-farmer exception breaches the U.S.'s obligations under paragraph 1 of GATT Article III. Furthermore, if the U.S. Secretary of Agriculture declines to approve a similar organic production law because it excuses small farmers from certification requirements, this action may breach the U.S.'s obligations under paragraph 4 of GATT Article III.

47. See *supra* text accompanying note 10.

48. See *supra* text accompanying note 11.

49. See Alexander R. Nemaiovsky & Terence J. Centner, *Pesticide Residues in Food: The Delaney Clause and Global Harmonization of Pesticide Standards*, 7 AGRIBUSINESS 187 (1991).